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In the Supreme Court of the  
United States

OCTOBER TERM, 1976

No. 76-90

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WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION  
ASSOCIATION, AND FRANK TEMOKE,

*Petitioners.*

vs.

THE UNITED STATES OF AMERICA, AND THE WESTERN  
SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE  
TEMOKE BANDS OF WESTERN SHOSHONE INDIANS,  
NEVADA,

*Respondents.*

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PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION FOR  
RESPONDENT, THE WESTERN SHOSHONE IDENTIFIABLE  
GROUP REPRESENTED BY THE TEMOKE BANDS

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The brief filed by the attorney for the Respondent, Western Shoshone Identifiable Group, opposing the Petition before the Court is inapporpriate in the extreme as it is based entirely upon alleged facts which were disputed below in the pleadings, proffers of proof and affidavits submitted by Petitioners. Since Petitioners were denied a hearing on these disputed facts, it would seem axiomatic

that these allegations cannot be considered by the Court in deciding whether to grant the Petition for Certiorari.

The thrust of the brief filed by the claims attorney is that the entire Identifiable Group to which Petitioners belong is actually in control of the claim through a "claims committee" which was democratically elected, and hence Petitioners did have imput, but failed only because they are a small minority who cannot persuade their fellow tribesmen. While Petitioners do not concede that they would not still be entitled to a hearing even if such allegations were true, Petitioners have claimed that those allegations were false. The only evidence in support of those allegations were the two affidavits of members of the "claims committee" which were attached to the claims attorney's brief *on appeal* to the Court of Claims. Petitioners submitted a counter affidavit by another member of the "claims committee"<sup>1</sup>, who was also a former Chairman of the Temoak Bands Business Council (the exclusive representative plaintiff), to the effect that: (1) The "claims committee" was formulated after the Temoak Bands Business Council refused to approve a loan on behalf of the entire Identifiable Group because they recognized they represented only a minority of the Group; (2) that the members of the "claims committee" were elected at meetings by small minorities after the majority

of Western Shoshones walked out of the meetings in protest of the handling of the claim by the claims attorney; (3) that these elections were conducted with no precautions against unauthorized persons voting or against one person voting at more than one meeting; (4) that the "claims committee" acted initially under the domination of the claims attorney and actually did not make its own decisions; (5) that the "claims committee" in 1975, attempted to direct the claims attorney to remove lands from the claim and were refused; (6) that on other occasions the claims attorney ignored requests of the "claims committee"; (7) that the "claims committee" has never had any by-laws or other procedural rules and the members did not have specific periods of tenure; (8) that affiant disputed the claims in the opposing affidavits that a majority of the Group supported the claim; and (9) that the Western Shoshone People never were afforded an opportunity to decide whether to include lands in the claim or to attempt to retain title to them.

It should be stressed that the Court of Claims below did not base its decision on the legitimacy of the "claims committee", but throughout its decision assumed that the Temoak Bands was in control of the litigation, in fact that Court held that Temoak Bands was the *exclusive* representative having control over the litigation strategy. Petition, App. 46a-47a. It is this holding, that the Temoak Bands, a small part of the entire Identifiable Group, can give up the property rights of the entire Identifiable Group without the Indian Claims Commission according

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<sup>1</sup>This affidavit was not submitted until the Petition for rehearing because counsel for the Petitioners did not believe submission of affidavits on appeal was proper under the rules until the Court of Claims complained that there were no counter affidavits. Petition, App. 38a. It should be remembered that the Indian Claims Commission denied Petitioners the opportunity to submit affidavits.

a hearing to the remainder of the Group, which Petitioners are asking this Court to review.

In his brief opposing the Petition, the claims attorney also inappropriately attacks the substantive legal theory of Petitioners regarding the Western Shoshone claim of aboriginal and treaty title. Again, since Petitioners were not accorded a hearing on this issue before the Indian Claims Commission, it is not procedurally proper to raise it at this stage of the proceedings.<sup>2</sup> While the opinion, supporting the order of dismissal of the Indian Claims Commission below, did discuss what the Commission (incorrectly) supposed the substantive theory of Petitioners to be, such discussion acknowledged that the issue of extinguishment of title was not before the Commission. Petition, App. 16a. Because of that lengthy dictum concerning the substantive issue contained in the opinion of the Commission, Petitioners submitted to the Court of Claims a brief on the question. The Court of Claims, correctly, did not rule on the merits of this issue, but merely noted: "Certainly the arguments in favor of [Petitioners] position are not overwhelming or clear as day. At the best, from their viewpoint the question is an open one which could be decided either way." Petition, App. 46a. The Court went on to hold that the Temoak Bands had the privilege to decide the issue as part of its litigation strategy, and by implication, Petitioners did not have a right to prove to the Commission that they still held title. *id.*

<sup>2</sup>As pointed out to the Court of Claims, the issue of extinguishment of title could not be resolved without the submission of evidence and Petitioners supplied that court with a list of exhibits that they would have submitted to the Indian Claims Commission if that tribunal had not refused to accept evidence in any form.

According, Petitioners will not argue the validity of their claim of title here.

The brief submitted by the claims attorney also states: "Realizing that no collusion had ever occurred as this term has always been defined, Petitioners argued that, . . . 'collusion' should include *any* position taken by the duly authorized representative of the Identifiable Group with which the Petitioners disagreed." Brief in Opposition for Respondent Identifiable Group, p. 9. On the contrary, Petitioners offered to prove collusion under *any* definition of that term but the Commission refused them the opportunity to present evidence and, therefore, at the oral argument on collusion, Petitioners were forced by a lack of evidence to adopt, as a secondary position, the theory that 'collusion', for purposes of determining whether the remainder of the Identifiable Group should have access to the Commission, occurs when the exclusive representative joins with the United States in presenting a position contrary to the property interests of the remainder of the Group.

The Petitioners did inform the Commission that they could prove 'collusion' of a more sinister and fraudulent sort if given the opportunity. It should be noted that the Commission not only forbade the introduction of affidavits or other evidence, but did not call for detailed proffers of proof, nor is there any provision in the Rules of the Commission for making the same. Such proffers and allegations that were made were interjected by Petitioners in the exchange of pleadings. At the hearing in the Court of Claims on the motion to dismiss the appeal, the

Court of Claims instructed Counsel for Petitioners to set out the matters they *would have proved had they been given an opportunity* before the Commission. Petitioners responded with a list of proffers including offers to prove specified acts of deception on the part of both Respondents to mislead both the Commission and the Western Shoshone Indians to facilitate the obtaining of a judicial decision defrauding the Western Shoshone People of their rights, that is, specific acts constituting classic 'collusion'. Black, Law Dictionary (4th ed., 1951). The Court of Claims then refused to consider these proffers because they were belatedly interjected on appeal and not supported *by evidence*, Petition, App. 38a., ignoring the fact that Petitioners had no opportunity in the Commission to do so.

The brief of the claims attorney closes with a repetition of the assertion that Petitioners have been unable to affect the conduct of the claim because they are a small minority. This is in direct conflict with Petitioners' proffer of proof in the Indian Claims Commission that the "vast majority of the people comprising the Western Shoshone Identifiable Group now desire to have the issue of the validity of their title determined" before termination of the claims proceeding. See, Decision of the Court of Claims, App. 43a.

Petitioners are seeking Certiorari to have this Court review matters involving procedural issues and due process of law. Petitioners were denied an opportunity to present evidence in support of their allegations and proffers despite repeated requests for an evidentiary hearing

or other procedural means to resolve the conflicting contentions in the pleadings. Under these circumstances, as the Court of Claims more or less acknowledged, the allegations and proffers must be taken as true. Petitioners have alleged and proffered, among other things, that: The Temoak Bands, or more accurately, the claims attorney, has joined with the United States in falsely representing to the Commission that lands belonging to the entire Identifiable Group have been taken by the United States. The majority of the members of the Identifiable Group wish to assert their title to these lands which they will be precluded from doing if the claim proceeds on its present course. The majority of members of the Group have no political or other control over the Temoak Bands or the claims attorney. It is respectfully submitted that the dismissal of Petitioners request to intervene without a full hearing does raise grave issues concerning the taking of property rights belonging to the entire Identifiable Group which this Court should review.

Respectfully submitted,

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